

Nguyen (Migration) [2018] AATA 1817 (16 April 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Dai Le Nguyen

CASE NUMBER: 1700090

DIBP REFERENCE(S): BCC2015/1459249

MEMBER: Adrienne Millbank

DATE: 16 April 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 16 April 2018 at 5:01pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether a genuine spousal relationship exists – Largely separate finances – Lack of joint household responsibilities – Social aspects of relationship – Lack of long-term commitment – Witness credibility – Inconsistencies in evidence – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 13 December 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 20 May 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a). On the information and evidence provided, the Delegate was not satisfied that the applicant was the spouse or de facto partner of the sponsor, as defined under section 5F and 5CB of the Migration Act.
4. The Tribunal wrote to the applicant on 30 January 2018, through his representative, inviting him to provide, by 13 February 2018, further information in support of his claim to be in a genuine spousal relationship with the sponsor. Further information was received on 13 February 2018. Further evidence was provided to the Tribunal on 29 March 2018, prior to the hearing.
5. The applicant appeared before the Tribunal on 29 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and two supporting witnesses. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The applicant was born in 1991, in Vietnam, and is 27 years old at the time of decision. The sponsor was born in Vietnam in 1981 and is 37 years old at the time of decision.
9. The applicant first arrived in Australia on 4 March 2013, on a Student (subclass 573) visa. At hearing he advised that he undertook a course in English, but abandoned his degree course in Sports Management after one semester, in 2014, because he failed a lot of subjects, and 'needed to work'. He lodged the Partner visa application on 21 May 2015, and was granted a Bridging Visa C, with work rights, in association with the application. At the time of this decision he was working as a sheet-metal worker.
10. The sponsor was born in Vietnam and first arrived in Australia in 1992, with her family, [from] the Philippines. She obtained Australian citizenship by grant in 1994. At the time of application, she did not declare any previous marriages or relationships. At hearing she confirmed that her two children, a son born in 2001 and a daughter born in 2005, were from one previous de facto relationship. She claimed that she has had no contact with her former

de facto partner for 'eight to ten years', and that he has no relationship with his children and paid no child support.

11. At the time of application and decision the sponsor was the owner/manager of a Bubble-Tea shop.
12. The parties claim they first met on 17 March 2014 through, according to the sponsor, family friendships. The applicant was introduced to the sponsor by the applicant's cousin, with whom he was living at the time. The sponsor claimed at hearing that this cousin was a friend of hers, who managed a shop near her own business, and knew she was single and lonely. The sponsor advised that the relationship was encouraged strongly by the applicant's family in Vietnam, and by her own mother in Australia.
13. The parties claimed at the time of application that they committed to a shared life and decided to live together on 25 August 2014. At hearing they claimed the applicant moved in with the sponsor after their wedding. They participated in a Vietnamese wedding ceremony and reception on 10 December 2014, and married according to Australian marriage law in a civil ceremony at the sponsor's house on 1 January 2015.
14. The issue in the present case is whether the parties were in a genuine spousal relationship at the time the application was lodged, and this decision.
15. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who an Australian citizen.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. A copy of a Queensland marriage certificate was provided, certifying that the parties married, at Woodridge, on 1 January 2015. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

Financial aspects of the relationship

18. At the time of application, the parties provided a statement from their joint bank account, as at 7 December 2015. This showed a balance of \$55, and no transactions. A statement from 14 December–8 June 2015 showed several deposits in the order of \$150–\$300, and several small, one person-type purchases. The statements did not show that the parties shared their incomes or that the account was used to establish or manage a joint household.

19. Statements provided to the Tribunal showed that the applicant's salary, but not the sponsor's earnings, was deposited into the joint account in 2017. They show a number of small, one-person type transactions, for meals and petrol, near the applicant's work-place. They also show a few supermarket purchases. At hearing the applicant confirmed that he used the account, and that the sponsor had her own personal and business accounts, in another bank. The sponsor confirmed that she made the mortgage payments for her house, and paid rates and utilities bills, from her accounts. The sponsor stated that she used her own account for household shopping, but that she also used the joint account, sometimes, for grocery shopping.
20. The Tribunal asked the applicant the source of large, semi-regular deposits, in the order of \$2000, into the joint account, followed on the same or next day by cash withdrawals of similar amounts. He advised that the deposits were repayments for money he had loaned to friends. When asked about the large number of cash withdrawals from the joint account, he stated that he used cash for most of his purchases. He stated that he had borrowed money from his cousin, \$10,000, and that he had paid this back. He stated that that had he loaned a friend \$5000. He stated that he purchased a Louis Vuitton handbag for the sponsor's mother, his mother-in-law (as indicated by some photographs), as a celebratory gesture when he obtained secure full-time employment.
21. The parties provided a large number of receipts, in joint names, for small to medium-sized purchases and payments. These included: joint membership of Velocity frequent flyers club; donations of \$10 and \$100 to charities; a number of items of ladies' jewellery ranging in price from around \$15 to \$200; meals in inexpensive restaurants; purchases at Myer and Woolworths for \$11 and \$10; a mobile phone; a lap-top; and furniture items from Ikea ranging in price up to around \$250. The Tribunal asked the parties why they requested and kept receipts in joint names for small-scale everyday expenses such as a meal at a Mexican restaurant, or for items such as jewellery, that one might expect to be purchased by one person, for oneself, or possibly as a gift. The sponsor stated that they obtained and kept the receipts for the purpose of the visa application, on the advice of their migration agent.
22. The sponsor confirmed that she purchased a house, in 2011 or 2013, and that her house is in her name only. She and the applicant confirmed that they each have cars, registered in their names only, not in joint names. The Tribunal asked the sponsor why she had claimed to have insured her new car in joint names, when the paperwork from the insurance company she provided showed that it was insured in her name only. She pointed out that the applicant was listed in the insurance paperwork as a secondary driver of her car.
23. The parties confirmed at hearing that they have no significant joint assets or joint loans. The applicant stated that the sponsor's house was 'all set up' when he moved in, so there was no need for any major purchases. The Tribunal pointed out that a relationship goal of the parties, declared at the time of application, was to purchase a house together, and asked what progress they had made, in over three years of marriage, towards this goal. The parties acknowledged that they had made no savings together towards this goal. The representative argued that the applicant is young and has only had full-time work rights for a few years.
24. The Tribunal acknowledges that the applicant is younger than the sponsor and that he has had full-time work rights only for a few years. The Tribunal however finds the fact that the parties have made no progress towards their self-declared goal of purchasing a house together, and the applicant has made no progress towards his self-declared goal of supporting the sponsor financially while she has more children (discussed below), to indicate that these goals were fabricated for the purpose of the visa application.
25. The Tribunal found the applicant evasive and opaque when responding to questions about his financial situation and arrangements. The Tribunal notes that the sponsor has maintained

her own financial arrangements, her personal and business accounts, separate from the applicant's financial arrangements. The Tribunal acknowledges that the parties have a joint bank account and have made a large number of purchases in joint names, but gives this evidence little weight because the purchases were mostly small-scale and the evidence appears to have been contrived for the purpose of the visa application.

26. On the evidence provided, the Tribunal is not satisfied that the parties have pooled their finances and shared day-to-day expenses commensurate with being in a genuine spousal relationship.

Nature of the household

27. At the time of application, the applicant stated that the parties committed to a shared life and decided to live together in August 2014. At the hearing, however, the sponsor stated that the applicant only moved into her house, from his cousin's house where he lived, after their Vietnamese wedding in December 2014. Copies of mail sent to the parties at the same Woodridge address were provided. The applicant advised that the time of decision there were five people in the house: the parties, the sponsor's two children, and his cousin. He stated that his cousin paid rent, in cash, to the sponsor.
28. The applicant claimed that he did 'all the housework' in the house. He also claimed that he was working seven days a week. The sponsor stated that the applicant arrived home earlier than she did and supervised her school-age children, for which she was grateful. On further questioning the applicant acknowledged that the sponsor did the cooking and the shopping in the household, but maintained that he did the cleaning and outside maintenance.
29. The Tribunal accepts that the parties have lived at the same address since their marriage; that the applicant helps supervise the sponsor's school-age children; and that he contributes to the household cleaning and maintenance. The parties' financial arrangements, as evidenced by statements from their joint bank account and testimony provided at hearing, do not show, however, that they have established a joint household together as a spousal couple, and for this reason the Tribunal does not accept that they have pooled their resources and lived together in the sponsor's house as a couple in a genuine spousal relationship.

Social aspects of the relationship

30. Statutory declarations were provided at the time of application, in April 2015, by friends of the parties who declared they had witnessed the parties together at family gatherings; shopping and eating out together 'very happily'; and at home 'always joyfully helping each other with the cooking and cleaning'. Statutory declarations were provided at the time of decision, in March 2018, including from a friend of the applicant stating that he had observed the applicant to return home to have dinner with the sponsor following football; and from a colleague of the applicant declaring that he was introduced to the sponsor at a birthday party and observed the parties and the sponsor's children to be a happy family.
31. The Tribunal accepts that the applicant has lived in the sponsor's house since their marriage, and that they have attended family functions together. The Tribunal does not find the testimony of the declarants that they have observed the parties to be a happy family, joyfully cooking and cleaning together, sufficiently detailed and relationship-specific to be convincing. The Tribunal notes that the applicant, at hearing, described a delineation of household duties, whereby the sponsor did the cooking, and he did the cleaning.
32. Many tens of photos were provided showing the parties together, at home with the sponsor's children, out as a couple, and eating with friends. Many tens of photos were provided of the

parties' trip to Vietnam in 2017, showing them travelling, sightseeing, and sharing meals together and with family members. Many tens of photos were provided of the parties' Vietnamese wedding, showing them together and with family and friends. When asked why so many photos were provided, showing the same people on the same occasion, the sponsor advised that the photos were provided for the purpose of the visa application.

33. The Tribunal accepts, on the evidence provided, that the parties have travelled to Vietnam together and that they have met members of each other's families in both Vietnam and Australia. The Tribunal accepts on the evidence provided that the parties are recognised as having married by family members and friends, and that these family members and friends support the applicant's visa application. The Tribunal does not find the statutory declarations and photos in themselves to be convincing evidence that the parties are in a genuine spousal relationship.

Nature of persons' commitment to each other

34. The Tribunal put to the parties that the applicant was only 24 when he entered into the marriage, that he had just abandoned his studies, and that he was at a different life-stage from the sponsor (because he is ten years younger, because she already had many years' experience as a self-employed business person, and because she had two teenage children). The Tribunal put to the parties also that the applicant was looking for a pathway to remain in Australia when the parties were introduced to each other. The Tribunal questioned whether the applicant in fact shared the sponsor's declared relationship goal of living a 'quiet, simple life'.
35. The applicant maintained that he fell in love with the sponsor soon after entering into discussions with her as a potential marriage partner, and that he wanted to remain and work in this country in order to provide for her financially. The sponsor advised that her friend, the applicant's cousin, knew when she arranged the introduction, that she was alone and lonely.
36. Having considered the circumstances of the applicant; the parties' acknowledgement that they gathered evidence of relationship such as receipts in joint names for everyday-type expenses, and photos, for the purpose of obtaining the visa; and the lack of evidence of the sort of pooling of financial resources that would be expected in a committed marriage, the Tribunal does not find the applicant's claims that entered into a spousal relationship with the sponsor because he fell in love with her, and that he wants to remain in the country in order to provide for her financially, convincing.
37. The Tribunal asked the parties about a further relationship goal they declared at the time of application: to have children. They stated that they still intended to have children, but in the future, in a few years, when they are financially secure. The Tribunal notes that at the time of decision the sponsor is 37 years old, and already has children, aged around 17 and 13. The Tribunal found the parties' claim to intend to have children of the relationship sometime in the future, when they are more financially secure, unconvincing.
38. The Tribunal accepts that the parties have drawn some companionship and emotional support from each other but is of the view that this has been within the context of a cousin-of-a-friend/ housemate/contrived arrangement, rather than a genuine spousal relationship. Having considered the evidence and the circumstances of the applicant and the sponsor, the Tribunal is not satisfied that the parties see the relationship as continuing long-term.

Any other relevant considerations

39. The Tribunal advised the parties at hearing that it remained concerned about a number of discrepancies in the evidence provided. At the time of application, the applicant declared that

the parties first met at the Phap Quang Buddhist Temple in Durack: the sponsor however confirmed at hearing that they met at the applicant's cousin's house, where he was living at the time. At the time of application, the applicant declared that they decided to move in together in August 2014: the sponsor however confirmed that the applicant did not move into her house until after their Vietnamese wedding ceremony in December 2015. In a written submission provided to the Tribunal, the parties' agent stated that the sponsor had insured her new car in joint names: the sponsor however acknowledged that she had in fact only listed the applicant as a driver of the vehicle.

40. The applicant did not dispute the corrections provided by the sponsor, but argued that the house he lived in with his cousin was near the Phap Quang Temple, and that the parties took walks there when discussing their potential relationship. The Tribunal accept that the parties took walks together near the Phap Quang Temple while discussing their potential relationship, but find the discrepancies in the information and evidence provided indicative that the parties were not, at the time of application or decision, in a genuine relationship.
41. As noted above, the parties acknowledged during the hearing that their evidence of photos and receipts for everyday expenses, was organised with the purpose of applying for the visa, or review of the Delegate's decision, in mind. The discrepancies in the information and evidence provided by the parties, and their acknowledgement that much of the evidence was organised for the purpose of the application and review, contributed to the Tribunal forming the view that the relationship was contrived for the purpose of obtaining a visa.
42. Having considered the evidence and r.1.15A(3) matters, and the circumstances of the parties, as discussed above, the Tribunal is not satisfied that the parties have a mutual commitment to shared life to the exclusion of others. The Tribunal is not satisfied that they are in a genuine and continuing relationship.
43. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made or the time of this decision.
44. Therefore the applicant does not meet cl.820.211(2)(a) or cl.820.221.
45. Alternative criteria in cl.820.211(7), 820.211(8), 820.211(9), 820.221(2), 820.221(3) (death, family violence, child exceptions) are not relevant to the applicant's circumstances, and he has made no claims against these criteria.
46. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

47. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).